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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 *A.R., individually and on*
4 *behalf of all others*
similarly,

5 Plaintiffs,

6 v.

15 CV 9242 (RMB)

7 THE CITY OF NEW YORK, *et al.*,

8 Defendants.

9 -----x
New York, N.Y.
10 February 17, 2016
11 10:15 a.m.

12 Before:

13 HON. RICHARD M. BERMAN,

District Judge

14 APPEARANCES

15 GISKAN, SOLOTAROFF & ANDERSON & STEWART, LLP

16 Attorneys for Plaintiffs

17 BY: RAYMOND AUDAIN

SCOTT SIMPSON

18 THE NEW YORK CITY LAW DEPARTMENT

19 Attorneys for Defendants

20 BY: ARTHUR LARKIN
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1 (Case called; in open court)

2 THE COURT: Please be seated.

3 There are a few things on my agenda and perhaps yours
4 as well. Why don't we start by your telling me what the status
5 of the case is.

6 MR. SIMPSON: At this point, your Honor, we served
7 document requests. We're waiting responses to those.
8 Otherwise, not much has happened in the case.

9 THE COURT: Do you have a case management plan?

10 MR. SIMPSON: Pardon?

11 THE COURT: Do we have a case management plan?

12 MR. SIMPSON: Yes, your Honor.

13 THE COURT: Are you proceeding according to that
14 schedule?

15 MR. SIMPSON: We are proceeding according to that
16 schedule. We have until the middle of June to complete
17 discovery.

18 THE COURT: Any settlement discussions or no?

19 MR. SIMPSON: I think those would be premature. I
20 think we have such different understandings about what this
21 case is about. I don't think settlement discussions at this
22 point will be very productive.

23 THE COURT: You are seeking class status; is that
24 right?

25 MR. SIMPSON: Eventually, yes.

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1 THE COURT: Eventually, meaning when?

2 MR. SIMPSON: Meaning once we get a little bit of
3 class discovery and we anticipate moving for class
4 certification at that point. At this point I don't think we're
5 in a position to move for class certification. That is about
6 it from your point of view.

7 THE COURT: Do you have anything else?

8 MR. SIMPSON: No, other than the proposed motion.

9 THE COURT: We'll hear from the proponent of the
10 motion first.

11 MR. SIMPSON: Also, we made an application to proceed
12 anonymously.

13 THE COURT: We'll get to that.

14 MR. SIMPSON: Okay.

15 THE COURT: So I don't quite understand how we do
16 that. That's not really true that I don't understand. I
17 understand how one would do that. It's not generally speaking
18 my practice to do anything anonymous. Sometimes when we have
19 in a criminal case with a cooperator, we keep that under wraps
20 for safety reasons. In a civil action, particularly that
21 purports to be a class action, it is not quite clear to me that
22 that is appropriate. If there is motion practice, we'll let
23 each side brief that issue in the motion practice.

24 MR. SIMPSON: Okay.

25 THE COURT: So is there motion practice? You want to

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1 make a motion to dismiss?

2 MR. LARKIN: Partial motion, your Honor.

3 THE COURT: Let me tell you what the other rules are.
4 Partial, there is no other part. So if you have anything else
5 with respect to a motion to dismiss, now is the time.
6 Otherwise the next time I hear from you would be summary
7 judgment.

8 MR. LARKIN: Right. Understood, your Honor. I think
9 the first point that I would like to make is the commissioner,
10 Commissioner Ponte, publically said that searches, strip
11 searches of visitors generally are not permitted by DOC policy
12 and he's concerned -- he would be concerned if there were even
13 one such incident to have occurred.

14 THE COURT: And we have a class full of them.

15 MR. LARKIN: Well, what we have, your Honor, in the
16 complaint is allegations by three individuals that there were a
17 total of eight or nine searches that they can state from their
18 own personal knowledge of or information of eight or nine
19 searches, five of which were strip searches and three or four
20 which were not strip searches and were not alleged to have
21 violated the Constitution or to have violated a visitors'
22 rights. When you consider the number of searches that occur --
23 excuse me, the number of visits that occur to Rikers Island
24 every day, numbers like that are just not sufficient to state a
25 Monell claim.

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1 THE COURT: Wait. You just said the Commissioner
2 feels that even one such search would be --

3 MR. LARKIN: No, no.

4 THE COURT: -- would be something terrible and against
5 policy. Now you are saying five were insignificant?

6 MR. LARKIN: No. No. I am not saying it is
7 insignificant. I am not saying it is insignificant. I am
8 saying it is not enough to make out a pattern or practice claim
9 against the city. The *Twombly Iqbal* line--

10 THE COURT: What if he comes up with a class of 50 or
11 60 or 70 people? That is why presumably he is calling it a
12 class action because he thinks there may be more.

13 MR. LARKIN: They can call it whatever they want and
14 they can think there may be more. It is not material to
15 assessing the sufficiency of this complaint.

16 Now, plaintiff has as understand it --

17 THE COURT: The question is whether it is appropriate
18 to do that at this point in time until he knows a little bit
19 more.

20 MR. LARKIN: We think that respectfully, your Honor --

21 THE COURT: Respectfully.

22 MR. LARKIN: -- it is because the cases caution -- the
23 *Twombly Iqbal* line of cases caution against letting a massive,
24 factual controversy to proceed with the goal of weeding out
25 insufficient claims at the summary judgment stage. The whole

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1 point of the *Twombly Iqbal* --

2 THE COURT: I don't get the point you are making. You
3 are saying the Commissioner --

4 MR. LARKIN: I am saying --

5 THE COURT: Hold on.

6 You are saying that this doesn't happen. So maybe if
7 it happened on four or five cases, aberrational; right? That
8 is what you are saying.

9 MR. LARKIN: Essentially.

10 THE COURT: What are we weeding out?

11 MR. LARKIN: We're weeding out the Monell claim and
12 the discovery attendant to a Monell claim, which because the
13 complaint does not adequately state the Monell claim
14 sufficiently. We're not moving at this time to dismiss the
15 individual plaintiffs' claims. They may very well have claims
16 for damages.

17 THE COURT: I get it.

18 MR. LARKIN: They may very well be able to prove that
19 their rights were violated on the occasions that they say they
20 were violated; but in terms of pleading facts to support a
21 municipal policy, you have got to show a lot more than a
22 handful of incidents when your sort of universe interactions
23 between law enforcement and the citizens number in the hundreds
24 or the thousands -- the thousands -- every year. Three, four,
25 five is simply not enough.

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1 THE COURT: I get it. So at some point if that is the
2 universe that is what you are going to say. I get that. I
3 don't know what we're weeding out.

4 MR. LARKIN: Well, what we're weeding out is we're
5 getting rid of the Monell claims. The Monell claims should not
6 proceed through discovery and trial. That is our position
7 respectfully, your Honor.

8 THE COURT: Forget trial. Forget trial. Why
9 shouldn't they go a little further in discovery when he is
10 purporting to bring a class action and he is trying to figure
11 out who is in his class?

12 MR. LARKIN: Because the allegations in support of the
13 policy claim, the claim that there is a policy, are conclusory.
14 There are raw conclusions. Raw conclusions not facts, your
15 Honor.

16 THE COURT: I get it. I get it. At some point that
17 may be persuasive. I think it is a little early for the moment
18 because he has purporting to bring a class action here to
19 figure out whether there is a Monell problem or not. It's a
20 little early. I don't see the harm done.

21 MR. LARKIN: There is a lot of harm done. The burden
22 of discovery should not be borne by the municipal defendant or
23 any defendant unless the plaintiff can plead the claims
24 sufficiently in the complaint --

25 THE COURT: Oh, I see.

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1 MR. LARKIN: -- that is unless you can plead the facts
2 sufficiently in the complaint before you can take the
3 discovery. So we've agreed now or we've --

4 THE COURT: What does he have to plead that he didn't
5 plead already?

6 MR. LARKIN: Sufficient facts to show a practice of
7 strip searching visitors in ways that violate the Constitution
8 either through an official policy pronouncement by a
9 policymaker or by sufficient number of incidents to demonstrate
10 that the practice is persistent and widespread throughout the
11 jails and that is sort of the norm and that policymakers are on
12 actual constructive notice that the practice is ongoing.

13 THE COURT: All right.

14 MR. LARKIN: So we're proceeding in discovery, your
15 Honor, with regard to the underlying claims, the three named
16 plaintiffs and their damages claims. With respect to the
17 Monell claim, we do have we think legitimate concerns which is
18 why we're raising them at this stage.

19 THE COURT: So I am trying to figure out what those
20 concerns are. Because if the Commissioner is right and then if
21 he, the plaintiff, asks you, Have there been any other strip
22 searches reported in the city correction system," you are going
23 to say, No, because everyone follows the Commissioner's policy
24 of not doing these kinds of searches. If you come back and
25 say, Well, having looked there is about thousand of them, for

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1 example, then your argument is not so strong, is it?

2 MR. LARKIN: Respectfully, your Honor, I think that is
3 putting the cart before the horse. You've got to have a
4 good-faith basis to take discovery in the first place. You
5 can't have, it seems to me, three plaintiffs come into court
6 and say, We were all strip searched some of the time and some
7 of the time we were not strip searched and the strip searches
8 violated our rights and we think there is a class of people out
9 there based on just our experience and therefore we want to
10 take discovery, full discovery, on every single search of every
11 single visitor in the last three years to the Rikers Island
12 jails. The City now has to collect all of those documents and
13 produce all of those witnesses for deposition and bear a vast
14 and substantial burden, which is precisely the concern that
15 animated the court, the Supreme Court, in the *Twombly* and *Iqbal*
16 decisions, which is you have to plead more than what you have
17 here.

18 If I can give an example: The use-of-force class
19 action that we just litigated before Judge Swain and Magistrate
20 Judge Francis, plaintiffs were represented by the Legal Aid
21 Society and by two law firms, and the facts that were pleaded
22 involved prior lawsuits which were public knowledge. They
23 involved not only prior class action lawsuits from individual
24 jails but also individual claimants, individual plaintiffs who
25 had been involved in uses of force that had settled for

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1 substantial amounts of money. There were claims about expert
2 facts pleaded about prior expert assessments of the way force
3 was used in the city jails and allegations by 12 plaintiffs
4 that they were subjected to excessive force similar to the ways
5 that others in the past had been subjected to excessive force.
6 The content of the complaint was substantially different than
7 the content of this complaint, which is sparse when you
8 consider the kind of discovery that would be required to
9 address the Monell claims. I certainly don't want to waste the
10 Court's time.

11 THE COURT: Here is what I think is a happy
12 compromise: Why don't we set a deadline for the plaintiffs to
13 move for class certification and then in the opposition,
14 because I assume you will oppose that, you'll say, It shouldn't
15 be a class and for good measure there shouldn't be a Monell
16 claim. We'll do it at that time. So what is a reasonable time
17 for you to figure that out? He is not wrong. You should know
18 if you have a class or you don't have a class as opposed to
19 speculating that you do.

20 MR. SIMPSON: Well, I think part of it is whether we
21 can ascertain a class. I don't think that we can do that
22 without limited class discovery.

23 THE COURT: So it is limited; right? You are supposed
24 to know if you bring a securities case then you represent
25 everybody who bought Class A shares in Time Warner during the

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1 class period of these two years, right, and you allege that
2 your plaintiff or claimants are representative of all those
3 people because there was a false statements and it impacted
4 everybody in the class during that class period. You need to
5 figure that out.

6 MR. SIMPSON: Are you contemplating discovery or no
7 discovery?

8 THE COURT: In order to make a motion, you are
9 entitled to class discovery, sure. So I don't know what
10 exactly that entails.

11 MR. SIMPSON: Well, depending on when the City can
12 expect to produce some class discovery.

13 THE COURT: Did you make --

14 MR. SIMPSON: The request?

15 THE COURT: Yes.

16 MR. SIMPSON: Yes.

17 THE COURT: So your class discovery issues are on the
18 table?

19 MR. SIMPSON: Our class discovery issues are on the
20 table, yes.

21 THE COURT: Did you respond?

22 MR. SIMPSON: They haven't responded yet.

23 MR. LARKIN: We received discovery demands yesterday.

24 THE COURT: Oh, all right.

25 MR. LARKIN: Rule 34 discovery demands. We also

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1 received two weeks ago, your Honor, subpoenas that went to the
2 Department of Investigation and the Board of Correction, which
3 we're going to treat as a Rule 34 discovery demand and respond
4 accordingly. If the Court is contemplating class discovery,
5 what we would do, your Honor, is review the demands closely and
6 figure out and work with plaintiffs' counsel to figure out what
7 discovery is necessary for the class allegations opposed to the
8 merits allegations and we'll focus on that for the time being.

9 THE COURT: We'll get to the same point. There might
10 be a more efficient way to do it. I am going to refer this
11 discovery issue to Judge Maas.

12 MR. SIMPSON: Judge Fox is on the case.

13 THE COURT: Yes, you are right. You can have 30 days
14 to wrap that up.

15 MR. LARKIN: Okay.

16 THE COURT: Then we'll have you back here in late
17 March and see where you stand. This is without prejudice to
18 anybody's right to make a motion on any aspect of the case.

19 MR. SIMPSON: Your Honor, if it is all the same, may I
20 ask for a date in the first week of April?

21 THE COURT: Sure. The first week of April is April 4.
22 Actually, you can't. I have a trial that starts April 4. It
23 has to be in March.

24 MR. SIMPSON: I will accommodate the Court's schedule.

25 THE COURT: So let's say March 22. Let's get back

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1 together on March 22 at 10:00. We'll talk about a motion for
2 class certification at that time. If there is going to be one,
3 we'll set a schedule.

4 As to proceeding anonymously since we don't have a
5 motion schedule, why don't you give me a two- or three-page
6 letter application.

7 MR. SIMPSON: I believe I did, your Honor.

8 THE COURT: With authorities? Do we have that?

9 MR. SIMPSON: Yes.

10 MR. LARKIN: Yes.

11 THE COURT: You responded?

12 MR. LARKIN: We did reply, your Honor, yes.

13 THE COURT: That is adequate for me to rule on.

14 MR. SIMPSON: The last time we met, your Honor said
15 that you would rule based on those submissions.

16 THE COURT: Okay. I forgot. I will do just that.
17 That's it for me. Our deadline for class discovery is 3-16,
18 March 16. You are to deal with any problems or issues with
19 Judge Fox in the interim and on 3-22 at 10:00 we'll talk about
20 if there is a basis for a motion for class certification.

21 MR. SIMPSON: One more thing, your Honor. We would
22 like to add a fourth class representative. Can we amend the
23 claim?

24 THE COURT: A fourth plaintiff?

25 MR. SIMPSON: A fourth main plaintiff. Can we amend

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1 the complaint to do so?

2 THE COURT: Yes. By they way, based on what you said,
3 do you want to amend the complaint for any other reasons?

4 MR. SIMPSON: Yes. We would like to add some more
5 factual allegations.

6 THE COURT: When would you like to do that by?

7 MR. SIMPSON: Is 14 days okay?

8 THE COURT: I would do it in a week. We have a short
9 schedule.

10 MR. SIMPSON: That's fine.

11 THE COURT: Amend the complaint by the 24th. I am
12 sure you will but you should take seriously his complaints
13 about your complaint defects and see if you cannot fix them.

14 MR. SIMPSON: I will, your Honor. I just want to say
15 that I think at this point that the Court's role is to --

16 THE COURT: I will figure out what the Court's role
17 is.

18 MR. SIMPSON: Thank you, your Honor.

19 THE COURT: Nice to see you.

20 MR. LARKIN: Thank you, your Honor.

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